tions have caused A to delay in seeking relief against the forger of the bill who has consequently escaped or parted with his property, A may recover of B the amount advanced before the representation as well as after,[6] for here the position of A with respect to the entire matter has been altered, and the scope of the estoppel should be correspondingly widened. Some of these views, in substance, were recently expressed by the St. Louis (Mo.) Court of Appeals, which held that any liability of a principal based upon equitable estoppel, because of his failure to repudiate the contract of an agent acting beyond the scope of his authority, should extend only to such performance as took place after the duty to repudiate arose. *St. Louis Gunning Advertising Co.* v. *Wanamaker & Brown*, 90 S. W. Rep. 737. Some might be disposed to quarrel with the court's treatment of the vexed question of ratification by silence, but the opinion at least embodies a clearly expressed recognition of the true nature of equitable estoppel and of its proper limitations.

RECENT CASES.

ANIMALS — DAMAGE TO CHATTELS BY ANIMALS — RECOVERY FOR AS AGGRAVATION OF TRESPASS ON REALTY BY BEES. — The defendant's bees entered the plaintiff's close and therein stung to death the plaintiff's mules. The plaintiff brought trespass for the value of the mules, offering no proof of negligence. *Held*, that he cannot recover. *Petey Mfg. Co.* v. *Dryden*, 62 Atl. Rep. 1056 (Del. Superior Ct.).

The owner of a wild animal is commonly absolutely liable for its mischiefs. *Filburn* v. *Peoples Palace and Aqarium Co.*, 25 Q. B. 258. Though bees have been classified as wild animals for purposes of ownership, they are not so treated in fixing responsibility for their evil deeds. *Earl* v. *Van Alstine*, 8 Barb. (N.Y.) 630; *Cf. Parsons* v. *Manser*, 119 Iowa 88. This is reasonable, as they are no more prone to violence than many domestic animals, and their culture is too useful to be discouraged by imposing an insurer's liability. But in the principal case the bees were trespassing; and as a rule an owner is liable, irrespective of negligence, for his animals' trespasses on real property; all injury to chattels during the trespass being counted in aggravation of damage, even though the trespass itself be purely nominal. *Dolph* v. *Ferris*, 7 W. & S. (Pa.) 367; *cf. Van Leaven* v. *Lyke*, 1 N. Y. 515; *Loftus* v. *Ellis Iron Co.*, L. R. 10 C. P. 10. There is however, no absolute liability for the trespasses of dogs because their trespasses are not usually injurious to the realty. *Brown, Esq.*, v. *Giles*, 1 C. & P. 118. The same rule should obviously apply to bees, and if the owner is not to be held absolutely responsible for their trespasses on realty, *a fortiori* he should not be so held for incidental damage to personalty.

BANKRUPTCY — PARTNERSHIP AND INDIVIDUAL CLAIMS AND ASSETS — ADMINISTRATION OF NON-BANKRUPT PARTNER'S ESTATE. — A partnership was adjudged bankrupt, but some partners had not participated in the act of bankrupcy, and others, being in the exempt class, could not be adjudicated bankrupts. By an order of the court all the partners were required to turn over their property to the trustee of the partnership estate, to be administered as if each had been adjudged bankrupt. *Held*, that as an incident to the administration of the partnership estate, a court of bankruptcy may administer

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[6] Knights *v.* Wiffen, L. R. 5 Q. B. 660; Continental Bank *v.* National Bank, 50 N. Y. 575.

the individual estate of the partners. *Dickas* v. *Barnes*, 140 Fed. Rep. 849 (C. C. A., Sixth Circ.).

The present Bankruptcy Act marks a radical departure in treating a partnership as a legal person apart from its constituent members. Therefore a partnership may be put into bankruptcy without proceeding against the individual partners. *In re Stein*, 127 Fed. Rep. 547. Conversely, the bankruptcy of all its members does not give jurisdiction over a firm and its assets. *In re Mercur*, 116 Fed. Rep. 655. But an adoption of the mercantile conception of a partnership compels a recognition of the fact that the true relationship of the partners to the partnership is that of contributories or quasi-sureties. See 19 AM. L. REV. 32. The liability of the partners to satisfy any deficiency in meeting firm obligations is one of the assets of the firm. This is recognized in refusing to regard the firm insolvent while one of its members is solvent. *Vaccaro* v. *Security Bank*, 103 Fed. Rep. 436; *In re Perley & Hayes*, 138 Fed. Rep. 927. If, then, the partnership is a distinct legal entity, and the right to call upon the partners for contribution is merely a firm asset, that asset should be collected like other assets, and there is no more basis for administering the individual estates of the partners, who could not be adjudicated bankrupts, than that of a surety on an obligation to the firm. Yet the principal case finds support in previous rulings. *In re Stokes*, 106 Fed. Rep. 312; see *In re Meyer*, 98 Fed. Rep. 976. This unwarranted result indicates a failure to appreciate fully the legislative innovation in partnership law, and shows an unconscious adherence to the older law.

BANKS AND BANKING — DEPOSITS — DIRECTORS' LIABILITY FOR DEPOSITS RECEIVED AFTER KNOWN INSOLVENCY. — With knowledge of a bank's insolvency a director permitted it to receive deposits in the usual manner. The plaintiff became a surety on the bond of the bank to secure deposits of county funds, and having paid the depositing county for the loss it suffered through the insolvency, sought to recover that sum from the director. *Held*, that the director is not liable, since he is not a trustee for creditors, nor does he individually owe depositors any duty. *Hart* v. *Evanson*, 105 N. W. Rep. 942 (N. Dak.).

Where directors are not under a statutory liability to depositors for deposits received after knowledge of the bank's insolvency they have been held directly liable at common law. *Foster* v. *Bank of Abingdon*, 88 Fed. Rep. 604; *Cassidy* v. *Uhlmann*, 27 N. Y., App. Div., 80, 163 N. Y. 380; *Delano* v. *Case*, 121 Ill. 247. It is true, as this decision points out, that those cases regard directors as trustees for creditors — a position hardly tenable. *Bank* v. *Hill*, 148 Mo. 380. But it does not follow that the directors are therefore under no liability whatever to such depositors. An officer or director who, knowing the bank's insolvency, expressly represents it to be sound, is liable in deceit. *Giddings* v. *Baker*, 80 Tex. 308. Although an individual by silence as to his embarrassed condition does not ordinarily represent his solvency, it has been suggested, that since a bank is under an extraordinary duty to discontinue business upon known insolvency, for a director to permit it to operate thereafter is a representation of solvency. *Cf. St. L., etc., Ry. Co.* v. *Johnston*, 133 U. S. 566, 578. Again, a bank which receives deposits under such circumstances becomes a constructive trustee, *ex maleficio*, for the depositor. *Wasson* v. *Hawkins*, 59 Fed. Rep. 233. And it is submitted that the director who acquiesces in mingling such funds with general assets colludes in a breach of trust and should be liable to the depositor and therefore, in the principal case, to the plaintiff, who is subrogated to the depositor's rights. *Cf. United Society* v. *Underwood*, 9 Bush (Ky.) 609, 619.

BILLS AND NOTES — NEGOTIABILITY — "PAYABLE ABSOLUTELY." — The defendant, a joint-stock company, issued coupon bonds payable out of the assets of the association, the stockholders, however, to be free from liability upon them. *Held*, that the bonds are not non-negotiable as being payable only out of a particular fund. *Hibbs* v. *Brown*, 35 N. Y. L. J. 249 (N. Y., App. Div., April, 1906).

From the necessity of making negotiable paper in the highest degree an

efficient circulating medium, there follow certain formal requisites. One of them is that a negotiable instrument must be supported by the general credit of the promisor and so be payable unconditionally. *Dawkes* v. *De Lorane*, 3 Wils. 207. Hence an instrument "payable out of a particular fund" within the prohibition of the Negotiable Instruments Law may be said to include one resting upon anything less than the entire assets of the promisor. The assets of a corporation do not, ordinarily, at least, include any individual liability on the part of its stockholders. See *Brown* v. *Eastern Slate Co.*, 134 Mass. 590. A joint-stock company, on the other hand, is a modified partnership, one of the assets of which, in a sense, is usually the financial responsibility of the shareholders. Indeed, the debts of the company are their debts. See *People* v. *Coleman*, 133 N. Y. 279, 285. In the present case only that portion of a company's credit represented by the property employed in its business is pledged for the payment of its bonds. They would seem, therefore, to be non-negotiable. The court follows a natural tendency to treat a joint-stock company as virtually a corporation distinct from its shareholders. See *Matter of Jones*, 172 N. Y. 575.

CHATTEL MORTGAGES — RECORDING AND REGISTRY — PRIORITY OF SUBSEQUENT LIEN FOR REPAIRS OVER RECORDED CHATTEL MORTGAGE. — The mortgagor of a wagon, who was allowed to retain possession of it and to use it in his business, left it with the defendant to be repaired without the knowledge or express consent of the mortgagee. *Held*, that the lien for repairs has priority over the recorded chattel mortgage. *Ruppert* v. *Zang*, 62 Atl. Rep. 998 (N. J., Sup. Ct.).

A mortgagor, even though in possession, cannot encumber the chattel with a lien, apart from statute, without the consent of the mortgagee. Therefore, a recorded chattel mortgage prevails over the subsequently acquired lien of a warehouseman, agister or owner of a stallion. *Storms* v. *Smith*, 137 Mass. 201; see 7 HARV. L. REV. 241; *Mayfield* v. *Spiva*, 100 Ala. 223. But the assent of the mortgagee may be implied from the circumstances. Thus, a liveryman's lien will prevail where the mortgagee knew that the mortgagor would board the mortgaged horse in some livery stable. *Lynde* v. *Parker*, 155 Mass. 481. Likewise, where the possession and use of a ship or of a locomotive are allowed to the mortgagor, assent to repairs incident to the use of them is implied. *Williams* v. *Allsup*, 10 C. B. (N. S.) 417; *Watts* v. *Sweeney*, 127 Ind. 116. The right to use a wagon naturally includes the right to keep it in a a state of repair fit for use. Furthermore, repairs enhance the value of the chattel as security. Under these circumstances, notwithstanding the absence of knowledge or of express consent, both reason and authority allow assent to be implied on the part of the mortgagee, which will secure to the artificer's lien priority over the mortgage. *Hammond* v. *Danielson*, 126 Mass. 294; *contra*, *Small* v. *Robinson*, 69 Me. 425.

CONFLICT OF LAWS — REMEDIES — PROCEDURE — ENFORCEMENT OF DOUBLE LIABILITY OF STOCKHOLDERS IN FOREIGN CORPORATIONS. — The plaintiff, a creditor of a Maryland trust company sued in his own behalf a stockholder for twice the par value of his stock, alleging that such liability to a creditor was imposed by a Maryland statute. Between the purchase of the defendant's stock and the date of this case, the statute was twice changed reducing the triple to double liability and making it only enforceable ratably through a bill in equity by one creditor in behalf of all. *Held*, that the plaintiff cannot recover. *Knickerbocker Trust Co.* v. *Iselin*, 35 N. Y. L. J. (N. Y., Ct. App., May 9, 1906).

When the defendant became a stockholder he subjected himself to an obligation, imposed by the laws of Maryland, to any creditor of the corporation and the plaintiff could then have recovered against him in this form of action in Maryland. *Cf. Miners, etc*, *Bank* v. *Snyder*, 100 Md. 57. And presumably he could have recovered in New York, on the ground that a non-penal obligation created by the laws of one state will be enforced in another if there is a suitable procedure and no public policy to the contrary. *Cf. Milliken* v. *Pratt*, 125 Mass. 374.

The alteration of the Maryland law, in the case of purchasers, prior to such alteration, affected only the remedy, leaving the obligation itself unchanged. *Miners, etc., Bank* v. *Snyder, supra.* As the remedy is exclusively a concern of the *forum* the plaintiff settling in New York should not be subject to any restrictions subsequently imposed on the remedy by the *lex loci contractus*, and should, therefore, be allowed to recover as if before the change. *De Le Vega* v. *Vianna*, 1 B. & A. 284. The court purports to follow a prior New York case which differs slightly in that there the local statute governing the remedy anti-dated the purchase of the shares. *Cf. Marshall* v. *Sherman*, 148 N. Y. 9; but see *contra*, *Whitman* v. *Oxford National Bank*, 176 U. S. 559.

CONFLICT OF LAWS — REMEDIES: RIGHT OF ACTION — SUIT BETWEEN FOREIGNERS UPON FOREIGN TORT. — In an action of deceit in an English court of law the plaintiff was a domiciled Scotchman; the cause of action arose in Scotland; and the defendants were a Scotch banking corporation, service upon which was had through its London branch; its president, a Scotchman who appeared voluntarily; and two bankrupts who had not appeared, one a resident of London and one of Scotland. *Held*, that although the court has jurisdiction, it will stay proceedings against the bank and its president on a showing that they are greatly inconvenienced by the suit's being brought in England instead of in Scotland. *Logan* v. *Bank of Scotland*, 94 L. T. R. 153 (Eng., Ct. App., Dec. 21, 1905).

The court relies upon Scotch cases allowing a plea of *forum non conveniens*, and upon a New York case. See *Williamson* v. *North-Eastern Ry. Co.*, 21 Sc. L. Rep. 421; *Collard* v. *Beach*, 93 N. Y. App. Div. 339. It is often said that in cases of foreign torts between foreigners courts may in their discretion decline jurisdiction. *Collard* v. *Beach, supra;* see *Great Western Ry. Co.* v. *Miller*, 19 Mich. 305. But it seems to be more in accord with the nature of a court of law that it should be bound to take cognizance of cases within its jurisdiction. *Henry* v. *Sargeant*, 13 N. H. 321. It has been suggested also in the United States that the right to sue upon a cause of action arising in another state, the parties being citizens of other states, is one of the privileges guaranteed by the Constitution. *Enigartner* v. *Illinois Steel Co.*, 94 Wis. 70; but *cf.* 17 HARV. L. REV. 54. If, as the court suggests, the English action is so vexatious as to amount to a fraud upon the defendants, the decision might be explained as an equitable defense at law. But it seems doubtful that equity would have gone so far as to enjoin such an action, although it might grant a stay if under the same circumstances there were pending a foreign suit upon the same cause. See *McHenry* v. *Lewis*, 22 Ch. D. 397, 405.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — REVOCATION OF LICENSE TO SELL LIQUOR. — The Deputy ExciseCommissioner in the exercise of his statutory authority revoked without a hearing the relator's liquor license for not complying with the building laws. The license was assignable, and on its surrender before expiration the holder could obtain a restoration of part of the license fee. *Held*, that the relator has been deprived of his property without due process of law. *People ex rel. Loughran* v. *Flynn*, 110 N. Y., App. Div., 279. See NOTES, p. 607.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — VALIDITY OF STATUTORY REQUIREMENT FOR MAINTENANCE OF SUIT. — The defendant's charter provided that no action should be maintained against the city for personal injuries caused by snow and ice upon the streets, unless written notice of the defective highway had been given before the injury. After the passage of this act the plaintiff was injured by the existence of snow on the defendant's streets, and brought suit. No written notice of the defect had been previously given. *Held*, that this provision violates the guaranty against the deprivation of life, liberty, and property without due process of law, and is unconstitutional. *MacMullen* v. *City of Middletown*, 35 N. Y. L. J. 1 (N. Y., App. Div., March, 1906).

A municipal corporation is liable at common law, except in the New England

states, for injuries sustained through defects in its streets. See 2 DILLON, MUN. CORP., § 998. Statutes relieving the city of liability unless it had knowledge of the defect have been sustained, but where previous written notice of the defect is expressly required the question is new. See *McNally* v. *City of Cohoes*, 127 N. Y. 350. The court argues that this provision works a deprivation of substantially all legal remedy for injuries received from defective streets, since it imposes an unreasonable condition precedent on the right to maintain suit. This reasoning does not seem altogether satisfactory. It may be suggested that the statute alters the existing common law so that there is no right of action at all arising to the injured person unless the requisite notice has been previously given. The guaranty of due process of law applies only to vested rights. See COOLEY, CONST. LIM., 511. Since the anticipated continuance of the present general law is a mere expectancy, it would seem that under this interpretation of the question the plaintiff had been deprived of nothing protected by the Constitution. But see *Hanson* v. *Krehbill*, 75 Pac. Rep. 1041 (Kan.).

CONTRACTS — REMEDIES FOR BREACH OF CONTRACT — JUDGMENT ON INSTALLMENTS ALREADY DEFAULTED A BAR TO RECOVERY FOR REMAINDER. — The plaintiff contracted to purchase and the defendant to sell 50,000 pairs of bicycle pedals, to be delivered and paid for in installments at a price per pair. Before the time for final delivery, the defendant having delivered part of the installments and defaulted in others, the plaintiff obtained a judgment for failure to make the deliveries then due. After maturity of all installments he sued for failure to deliver the remainder. *Held*, that the former judgment is a bar. One justice dissented. *Pakas* v. *Hollingshead*, 184 N. Y. 211.

In consideration of the conveyance of real estate, the defendant agreed that the plaintiff should receive certain annual payments of money and goods and should have the use of two rooms upon the premises. The plaintiff in 1901 recovered a judgment for default of the annual payments already due; and in 1904, claiming subsequent breaches and repudiation of the contract, sought rescission of the contract and an accounting. *Held*, that the former judgment is not a bar. *Gall* v. *Gall*, 105 N. W. Rep. 953 (Wis.).

The first case affirms a judgment of the Appellate Division which was criticised in 18 HARV. L. REV. 619. See s. c. 99 N. Y., App. Div., 472. The second is in accordance with that criticism.

CORPORATIONS — DISSOLUTION — DEVOLUTION OF PERSONAL PROPERTY ON DISSOLUTION. — A corporation owning a leasehold transferred its assets to a second corporation. Payment was made for the leasehold, but by mistake no assignment was executed. The vendor company was dissolved, and later the vendee company petitioned for the appointment of a new trustee of the leasehold. *Held*, that the petition must be granted. *Re No. 9 Bomare Road*, [1906] 1 Ch. 359. See NOTES, p. 610.

CORPORATIONS — DUTIES OF DIRECTORS — DEGREE OF CARE REQUIRED TOWARDS CORPORATION. — The directors of an investment company, in good faith but under a mistake of judgment, declared dividends when the corporation was insolvent. *Held*, that they are not liable to the assignee. *Ebelhar* v. *German American Security Co.'s Assignee*, 91 S. W. Rep. 262 (Ky.). See NOTES, p. 613.

CORPORATIONS — FOREIGN CORPORATIONS — VALIDITY OF CONTRACTS MADE BEFORE COMPLIANCE WITH STATUTE. — A Missouri statute requires foreign corporations to comply with certain formalities before doing business in the state; imposes a fine for failure to do so; and provides that a corporation not complying cannot "maintain any suit in any of the courts of the state." The plaintiff, an Illinois corporation, entered into a contract in Missouri with the defendant without having complied with the statute. It subsequently did so, and brought action on the contract. *Held*, that the contract is void. *Tri-State, etc., Co.* v. *Forest Park, etc., Co.*, 90 S. W. Rep. 1020 (Mo., Sup. Ct.).

A state may impose such conditions as it sees fit on foreign corporations before allowing them to do business within its limits. See BEALE, FOREIGN CORP., §§ 116, 117. The object of the various statutes requiring compliance with certain formalities by foreign corporations is to protect persons dealing with them from imposition and to provide a convenient mode of securing jurisdiction over them. See MOR., PRIVATE CORP., § 665. Such statutes are accordingly held by the weight of authority not to make void the contracts entered into by the corporation before compliance with the statute. *State* v. *American Book Co.*, 69 Kan. 1; see BEALE, FOREIGN CORP., §§ 213, 214; *contra, Cincinnati, etc., Co.* v. *Rosenthal*, 55 Ill. 85. In jurisdictions taking this view suit may therefore be maintained on such contracts in the absence of express statutory prohibition. *Garratt Ford Co.* v. *Vermont Mfg. Co.*, 20 R. I. 187. Where, however, the statute expressly forbids the maintenance of suit, the weight of authority favors the view that this merely suspends the remedy and that a subsequent compliance with the statutory provisions removes the bar to such an action. *Security, etc., Assn.* v. *Elbert*, 153 Ind. 198; *contra, Heileman Brewing Co.* v. *Peimeisl*, 85 Minn. 121. And the fact that suit may be brought in the federal courts in such a case shows that the statute affects the remedy and not the right. *Blodgett* v. *Lanyon Zinc Co.*, 120 Fed. Rep. 893.

CORPORATIONS — STOCKHOLDERS: POWERS OF MAJORITY — RIGHT TO COMPEL DIRECTORS TO ACT. — Upon the refusal of the directors, in whom the business management of the corporation was vested, to make a transfer of certain assets in accordance with a majority vote of the stockholders, one of the majority stockholders filed a bill to compel the directors to execute the transfer. *Held*, that the directors, if agents at all, are agents of the corporate entity, and not of the majority stockholders, being by force of the contract of membership rather in the position of managing partners; and that until this contract is changed in the prescribed way a majority of the stockholders cannot compel the directors to act. *Automatic, etc., Co.* v. *Cunninghame*, 22 T. L. R. 378 (Eng., C. A., March 22, 1906).

This seems to be the first English decision upon this important question; and the American authority upon the point consists of *dicta*, analogies, and statements in text-books. The object of giving the corporate management to a board of directors is to have the business affairs controlled by their judgment. There must be action by the directors as such to make an act within their powers that of the corporation; a vote of the stockholders is insufficient. *Gashwiler* v. *Willis*, 33 Cal. 11. The power given directors is exclusive in its nature, and the stockholders cannot compel them to act contrary to their judgment. See *McCullough* v. *Moss*, 5 Den. (N. Y.) 567. A majority of the stockholders cannot prevent an act by the board of directors within its proper powers. *Hutchinson* v. *Green*, 91 Mo. 367; see THOMPSON, CORP., § 3968, § 5314. These holdings seem to be inconsistent with the idea that the directors are agents of the stockholders, for, if agents, their action could be compelled, restrained, or directed by their principals. So, too, if agents of the stockholders, the power of control would really vest the management in the stockholders and defeat the object of having directors.

CORPORATIONS — ULTRA VIRES CONTRACTS — DOUBLE LIABILITY ON SHARES HELD ULTRA VIRES. — A national bank purchased corporation shares *ultra vires*. *Held*, that it cannot be charged with double liability thereupon. *First National Bank* v. *Converse*, U. S. Sup. Ct., Feb. 19, 1906. See NOTES, p. 609.

CRIMINAL LAW — SPECIFIC INTENT — CRIMINAL RESPONSIBILITY OF DIRECTORS FOR ULTRA VIRES APPLICATION OF FUNDS. — The vice-president of the New York Life Insurance Co., who was also a member of the finance committee, having consented to an *ultra vires* application of the funds of the company, was arrested for statutory larceny. *Habeas corpus* proceedings to the warrant were instituted. *Held*, that enough evidence is disclosed to justify

the magistrate in issuing a warrant and allowing a jury to decide whether the money was applied with the requisite criminal intent. *People ex rel. Perkins* v. *Reardon*, 35 N. Y. L. J. 226 (N. Y. Sup. Ct. April 19, 1906). See NOTES, p. 611.

DEEDS — DELIVERY, ACKNOWLEDGMENT AND ACCEPTANCE — PRESUMPTION OF ACCEPTANCE. — An owner of land duly executed a deed running to his wife, and handed it to a third party to have it recorded, intending thereby to effect a delivery. The wife did not know of the existence of the deed till after the grantor's death, when she accepted it. *Held*, that title vests in the wife at the time of the delivery. *Russell* v. *May*, 90 S. W. Rep. 617 (Ark.). See NOTES, p. 612.

DEEDS — DELIVERY — DELIVERY TO THIRD PERSON TO BE DELIVERED UPON GRANTOR'S DEATH. — A executed a deed to the plaintiff and delivered it to X to be delivered to the plaintiff upon A's death. Subsequently, A delivered another deed of the same land to the defendant, who knew all the facts. The defendant's deed was first recorded, and both deeds were gratuitous. *Held*, that the plaintiff may obtain a decree for the cancellation of the deed to the defendant. *Grilley* v. *Atkins*, 62 Atl. Rep. 337 (Conn.).

The modern tendency of courts has been toward making the title of land, analogously to personal property, pass by deed at the moment when the grantor intends the transaction to be consummated. See *Bogie* v. *Bogie*, 35 Wis. 659, 667. Accordingly, on the facts of the principal case, though the first grantee is generally protected on some principle or other, yet many courts hold that the title does not pass to the grantee until the grantor's death. *Stone* v. *Duvall*, 77 Ill. 475; see 18 HARV. L. REV. 138. Under the old common law, the title to land passed with the actual delivery of the deed. See COMYNS DIG., 5th ed., 262. When the deed was handed to a stranger to be redelivered to the grantee, title passed either on the first or on the second delivery. See COMYNS DIG., 263, 264. Thus, in the case of escrows, title was transferred only on the second delivery; but where the second delivery depended on an event sure to happen, the deed was generally held to be the grantee's from the first delivery. See SHEP. TOUCH., 7th ed., 58; *Wheelwright* v. *Wheelwright*, 2 Mass. 447. These principles, which the Connecticut court reaffirms in reaching its decision, seem decidedly preferable to the modern hybrid doctrine mentioned above, produced by an unnatural combination of the elements of real and personal property law.

DIVORCE — ALIMONY — WHEN WIFE IS UNABLE TO OBTAIN DIVORCE ON ACCOUNT OF HER OWN MISCONDUCT. — A prior action for divorce having been dismissed because of the adultery of both husband and wife, the wife, being abandoned by her husband, brought a suit for separation. *Held*, that a decree ordering the husband to pay a certain sum of money to the wife be affirmed. *Hawkins* v. *Hawkins*, 110 N. Y. App. Div. 42.

Apparently the question whether the wife could obtain a judicial separation was not before the court, but the headnote of the case intimates that separation was decreed in the lower court. Since the adultery of the petitioner is a good defence to an action for absolute divorce, a decree of separation would seem to be opposed to the general view which makes no distinction between actions for absolute divorce and for separation as to the effectiveness of a recriminatory defence. *Lempriere* v. *Lempriere*, L. R. 1 P. & D. 569; 2 BISHOP, MAR., DIV., & SEP., 1st ed., § 365; N. Y. CODE, § 1765. But as the majority of jurisdictions allow an abandoned wife, either at common law or by statute, to maintain a bill for support or alimony, apart from any action or decree for divorce, and as a provision of the New York Code apparently effects the same result, the actual decision in the case is not open to the same objection as the decree for separation. 2 AM. & ENG. ENCYC., 2d ed., 94, 95; N. Y. CODE, § 1766; but see *Waring* v. *Waring*, 100 N. Y. 570. Though no decision exactly in point has been found, it seems highly desirable, as a matter of public policy, to allow

a wife, whom the law does not permit to be abandoned, to maintain against her husband a bill for her support, even if her guilt bars her from securing any form of divorce. *Cf. Bascom* v. *Bascom*, Wright (Oh.) 632.

DOWER — WHETHER BARRED BY VOID DIVORCE. — A wife, domiciled in New York, procured a divorce in Kansas which was invalid by the law of New York. On the death of her former husband she brought action for dower. *Held*, that having submitted to the jurisdiction of the Kansas court she cannot now question its decree of divorce, and is therefore barred of her right of dower. *Voke* v. *Platt*, 96 N. Y. Supp. 725.

A valid decree of divorce in the absence of statute will bar the wife's right to dower. *Pullen* v. *Pullen*, 52 N. J. Eq. 9; see 2 BISHOP, MAR., DIV., & SEP., §§ 1632–1640. This result follows whether the divorce be decreed by a domestic or foreign tribunal. *Hood* v. *Hood*, 110 Mass. 463. But where the divorce is void the marriage relation still subsists, and the wife's right to dower is therefore unaffected. *Cheely* v. *Clayton*, 110 U. S. 701. Where, however, the wife has removed to a foreign jurisdiction and obtained a decree for divorce, it is doubtful whether she can be heard to say that the decree is void and that she is entitled to her dower. The essential elements of an estoppel are obviously lacking. *Todd* v. *Kerr*, 42 Barb. (N. Y.) 317; *Holmes* v. *Holmes*, 4 Lans. (N. Y.) 388. Upon the principle, however, that where a party has invoked the jurisdiction of a court and submitted himself thereto, he cannot thereafter be heard to question such jurisdiction, it is held that the wife's claim is barred. *Starbuck* v. *Starbuck*, 173 N. Y. 503; *Ellis* v. *White*, 61 Ia. 644. Whether this extension of the doctrine of estoppel has yet become generally recognized as law may perhaps be doubted. That it will ultimately be so recognized seems probable from the tendency of the decisions.

ESTOPPEL — ESTOPPEL IN PAIS — PART OF A TRANSACTION. — An agent made a contract with A which was alleged to have been beyond the scope of his authority. After A had performed a portion of the contract he notified the principal, who failed to repudiate the agreement until performance had been completed. *Held*, that the principal's silence may go to the jury as evidence of intentional ratification, but that any liability based upon equitable estoppel must apply only to the performance subsequent to the day the principal was notified. *St. Louis Gunning Advertising Co.* v. *Wanamaker & Brown*, 90 S. W. Rep. 737 (Mo., St. Louis Ct. App.). See NOTES p. 614.

EVIDENCE — SIMILAR FACTS AND OCCURRENCES — CUSTOM AS EVIDENCE OF NEGLIGENCE. — The plaintiff, a cable splicer employed by the defendant company, while working on a telephone pole received a shock which threw him to the ground. *Held*, that the test of the company's negligence in its overhead construction is whether it used the care ordinarily exercised by other companies in the same business. *Law* v. *Central, etc., Telegraph Co.*, 140 Fed. Rep. 558 (Circ. Ct., W. D., Pa.).

A servant of the defendant telephone company, while at work on top of a pole, failed to catch a tool which another servant threw up to him. In its fall the tool injured a pedestrian. *Held*, that as tending to show negligence, evidence that it was customary to haul tools up by a line is admissible. *Brunke* v. *Missouri & K. Telephone Co.*, 90 S. W. Rep. 753 (Mo., Kansas City Ct. App.).

The first case, though supported by some authority, seems clearly indefensible on principle. The court sweeps away the distinction between a rule of evidence and a rule of substantive law. The care exercised by the ordinary prudent man under the circumstances is the fixed standard. What care other men, engaged in the same business, have been accustomed to use may be greater or less than that of the ordinary prudent man; and therefore, to show that a company acted in a particular matter as other companies are accustomed to do, does not show conclusively that that company was not negligent. *Maynard* v. *Buck*, 100 Mass.

40. But the care customarily employed by others is undoubtedly of strong probative value in determining what is due care under the circumstances. Accordingly, as a theoretical matter, the second case correctly admitted it as evidence. See 1 WIGMORE, EV., § 461. Practically, however, a jury is very likely to accept the customary conduct of others, not as evidence merely, but as the standard of care itself, and then to test the defendant's conduct by that standard. Because of this strong tendency to mislead, perhaps the best rule would be to exclude such evidence altogether. See 14 HARV. L. REV. 156.

FEDERAL COURTS — JURISDICTION AND POWERS — WHAT LAW GOVERNS CONTROVERSIES BETWEEN STATES. — The State of Missouri filed a bill in the Supreme Court of the United States for an injunction restraining the State of Illinois from using the Chicago Drainage Canal to discharge the sewage of the city of Chicago into the Mississippi River by way of the Illinois River, on the ground that the pollution thus caused was a nuisance. *Held*, that there is no evidence of sufficient pollution to constitute a common law nuisance; *semble*, that the plaintiff in such a suit must prove sufficient pollution to constitute a *casus belli* between independent nations. *State of Missouri* v. *State of Illinois, etc.*, 200 U. S. 496. See NOTES, p. 606.

FEDERAL COURTS — RELATION OF STATE AND FEDERAL COURTS — RIGHT OF REMOVAL. — To an indictment for murdering Governor Goebel, the defendant pleaded a pardon duly executed by Governor Taylor. The pardon was held void by the highest court of Kentucky on each of three successive appeals. The defendant thereupon petitioned the federal court for a removal of the cause under a federal statute providing that a cause may be removed to the federal courts when any criminal suit is brought in a state court against a person who cannot enforce in the judicial tribunals of the state any right secured to him by any law providing for the equal civil rights of citizens of the United States. *Held*, that whether or not the defendant would be denied such federal rights by the action of the state court, the case is not removable to the federal court, since he is not being deprived of his rights by the state laws or constitution. *Kentucky* v. *Powers*, 26 Sup. Ct. Rep. 387.

It is commonly stated that the removal statute applies primarily, if not exclusively, to a denial of federal rights by the constitution or laws of the state. See *Virginia* v. *Rives*, 100 U. S. 313, 319. In the present case the court construed the word "laws" as used in these *dicta* to mean "statutes." Such a construction is not justified by the natural meaning of the word or by the premise upon which the *dicta* are founded. The theory underlying the rule is that in order to remove a cause the accused must show a certainty of being denied a federal right, and that he cannot establish this unless there be a law which the state court will presumably follow, denying him such a right. This reason not only fails to support the present decision, but it points to the opposite result, for under the doctrine of *stare decisis* the Kentucky court would certainly follow its prior decisions denying the validity of this pardon.

HUSBAND AND WIFE — CONTRACTS BETWEEN HUSBAND AND WIFE — SEPARATION AGREEMENTS. — A husband and wife already living apart entered into an agreement whereby the husband promised to provide the wife with a certain income for the support of herself and children. *Held*, that the contract is enforceable, although made directly with the wife without the intervention of a trustee. *Effray* v. *Effray*, 97 N. Y. Supp. 286.

In holding that such a contract is not void as against public policy, the decision accords with both the English and American law. Allowing the agreement to be made directly with the wife without the intervention of a trustee is in harmony with the modern tendency to remove the disabilities of married women. For a discussion of the principles involved, see 15 HARV. L. REV. 147.

INFANTS — UNBORN CHILDREN — WHEN CHILD EN VENTRE SA MÈRE CONSIDERED BORN. — A will gave estates tail successively to the sons of a living person, with a proviso that any son born during the testator's lifetime should not take a larger interest than an estate for life. *Held*, that a son *en ventre sa mère* at the testator's death and subsequently born alive takes a life estate only. *Villar* v. *Gilbey*, 22 T. L. R. 347 (Eng., C. A., March 8, 1906).

The rule was early laid down that an infant *en ventre sa mère* would be regarded as born if it were for his benefit. *Doe d. Clarke* v. *Clarke*, 2 H. Bl. 399. But the English court formerly refused to apply this rule if the child's interest would be injured thereby. *Blasson* v. *Blasson*, 2 De G. J & S. 665. Recent English decisions make a considerable extension, applying the rule when considering the infant as born will benefit its parent and not injure the infant. *In re Burrows*, [1895] 2 Ch. 497. Further, it is held that for the purposes of the Rule against Perpetuities, a child *en ventre sa mère* will be regarded as a life in being even though it is prejudiced by being considered as born. *In re Wilmer's Trusts*, [1903] 1 Ch. 874, [1903] 2 Ch. 411. The proviso in the principal case was expressly confined to children "born," and it is a fiction so to regard an infant *en ventre sa mère*. The result is that the infant takes a life estate instead of an estate tail. The present decision virtually abrogates the doctrine of *Blasson* v. *Blasson*, and radically changes the English law. In only one of the cases cited by the court was the infant prejudiced by the fiction. *Cf. In re Wilmer's Trusts*, *supra*. That decision, however, finds explanation in the arbitrary nature of the Rule against Perpetuities, which regards the period of gestation, when gestation actually exists, as a term in gross. See GRAY, RULE AGAINST PERP., 2d ed., §§ 220–222.

INSURANCE — AMOUNT OF RECOVERY — EFFECT OF OTHER INSURANCE: PRO RATA CLAUSE. — A partner insured for $4,000 his two-thirds interest in firm property worth $4,090.53. The firm also insured its property for $1500 by a policy containing a *pro rata* clause. A fire damaged the property and the partner recovered $733.12 upon his personal insurance. The firm subsequently sued upon its policy. *Held*, that since the partner's risk and interest are not the same as those of the partnership the policies are not to be pro-rated. *Yanko & Lewitas* v. *Standard Fire Ins. Co.*, 23 Lanc. L. Rev. 163 (Pa., Super. Ct., Lanc. Co., March 12, 1906).

A *pro rata* clause, providing that the insured shall not recover on the policy a greater proportion of his loss than the amount thereby insured bears to the whole amount of insurance on the property, operates only so far as the same property, risk and interest are insured. The conclusion that the interests of the partner and of the firm are different is reached by viewing a partnership as a legal entity. But under the more generally accepted theory the interest of a firm in its property seems to be precisely the sum of the interests of all the partners. See LINDLEY, PARTNERSHIP, 7th ed., 128, 360. This is not altered by the fact that the partnership relation renders it impossible for any member to convey away his separate title to firm property. See *Sindelare* v. *Walker*, 137 Ill. 43. As to any partner's portion of the property right the interest of the firm coincides with the interest of such partner, and with respect to the coincident insurance it would seem that the companies should prorate. Pennsylvania, however, holds that where property is only in part the same there is no double insurance within the meaning of the *pro rata* clause. *Meigs* v. *Insurance Co. of No. Am.*, 205 Pa. St. 378. This rule appears to govern the principal case. The contrary doctrine upheld in New York is preferable. See *Ogden* v. *East River Ins. Co.*, 50 N.Y. 388.

INTERNATIONAL LAW — CHANGE OF SOVEREIGNTY — EXISTING LAWS IN PORTO RICO — EFFECT OF ANNEXATION THEREON. — The Foraker Act established a United States District Court of Porto Rico, and provided that the laws and ordinances of Porto Rico then in force should, with certain limitations, continue unchanged. After the passage of this Act, the virtual plaintiff below brought a common law action of trespass on the case, which action was not

only unknown to the civil code of Porto Rico, but was absolutely in conflict with the remedies therein provided. *Held*, that as the code provides for such a case, the proceedings below were null and void. Two justices dissented. *Perez* v. *Fernandez*, U. S. Sup. Ct., April 23, 1906.

Though this decision is of important practical significance in the administration of our new insular possessions, it is simply an application of the established doctrine that the laws of a legal unit remain substantially unaffected by conquest or change of sovereignty. See, generally, 11 HARV. L. REV. 343; 15 *ibid.* 220; 19 *ibid.* 131.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — LIBEL PER SE — The declaration charged that the defendant maliciously and falsely published concerning the plaintiff, [then a candidate for a minor office in the Republican party], an article containing statements that plaintiff "is absolutely devoid of any knowledge of the customs of polite men . . . devotes his time and energy more to assisting the Tammany leaders than to working for his own nominal party . . . apparently knows no more and cares no more for political principles than he does of the Silurian age in geology. . . ." To this declaration the defendant demurred. *Held*, that the article is not libelous *per se*, and in the absence of an allegation of special damage does not set forth a cause of action. *Duffy* v. *New York Evening Post*, 109 N. Y. App. Div. 471.

It is difficult to support this decision. Although there is some confusion in the authorities as to the exact limitations of "fair comment" on public characters, it is universally admitted that it never protects false statements of fact. *Burt* v. *Advertiser Newspaper Co*, 154 Mass. 238, 242. The phrase "libelous *per se*" is used in two senses: first, referring to matter which is libelous on its face, aside from collateral circumstances, and second, referring to matter which is libelous without the allegation of special damage. *Walker* v. *Tribune Co.*, 29 Fed. Rep. 827. The second signification is most commonly illustrated in cases of slander and it has been disputed whether it is applicable to libel at all. ODGERS, LIBEL AND SLANDER, 4th ed., 353. The present pleadings show a libel *per se*, it is believed, whichever use of the phrase is adopted, for the statements set forth in the declaration charge the commission of acts amounting to party treason, and the demurrer admits their publication. *Hamilton* v. *Eno*, 81 N. Y. 116; *Ulrich* v. *New York Press Co.*, 50 N. Y. Supp. 788 (Sup. Ct.).

POLICE POWER — REGULATION OF PROPERTY AND USE THEREOF — DESTRUCTION OF ILLEGALLY USED FISH-NETS WITHOUT JUDICIAL PROCESS. — An officer in pursuance of a state statute had without judicial process seized, and was about to sell, illegally used fish-nets. *Held*, that the owner cannot recover the nets, as the statute is constitutional. Two justices dissented. *Daniels* v. *Homer*, 139 N. C. 219.

The United States Supreme Court has held that a statute providing for the *destruction* of fish-nets illegally used without a hearing was constitutional, notwithstanding the Fourteenth Amendment. *Lawton* v. *Steele*, 152 U. S. 133; S. C., 119 N. Y. 226. The weight of authority seems, on the whole, to support such a decision, and it may well, on principle, be justified under the police power as an emergency means of abating a nuisance. In the present case, however, by allowing a sale after removal, the court makes an advance wrong in theory and contrary to the authorities. A statute essentially the same has been held unconstitutional. *Edson* v. *Crangle*, 62 Oh. St. 49. So also a statute providing for the sale without hearing of a trespassing ship was held unconstitutional. *Colan* v. *Lisk*, 135 N. Y. 188. This may perhaps be distinguished by the far greater value of the subject matter. But as the value of the fish-net in the principal case was $60, the same answer cannot be made to those cases holding unconstitutional similar statutes providing for the sale of a tortfeasor's horse or gun or of vagrant cows. *Dunn* v. *Burleigh*, 62 Me. 24; *McCounsell* v. *McKillip*, 65 L. R. A. 610 (Neb.); *Rockwell* v. *Waring*, 35 N. Y. 302.

PUBLIC OFFICERS — TERM OF OFFICE — POWER OF LEGISLATURE TO EXTEND TERM. — A statute which created the office to which an incumbent had been elected, required the election of a successor in 1905. A later statute, passed during incumbency, provided that the election should take place in 1906. *Held*, that this extension of the term is unconstitutional. *State ex rel. Hensley* v. *Plasters*, 105 N. W. Rep. 1092 (Neb.).

Where the constitution itself creates the office and expressly fixes or limits the term, the legislature is powerless to extend the term directly or indirectly. *State ex rel. Attorney-General* v. *Brewster*, 44 Oh. St. 589. But where the office and the term are the creatures of the legislature, there is abundant authority that the legislature has power to make reasonable alterations in the date of an election or of the beginning of a term, though incidentally the term of an incumbent is lengthened thereby. *Common Council* v. *Schmid*, 128 Mich. 379. To these two main propositions are attached several corollaries. Thus, a constitutional provision that no officer shall hold for a longer term than that for which he was elected does not prevent the incidental extension of a term where the constitution and the statute under which the officer was elected provide that he shall hold office till his successor is elected and qualifies. *State ex rel. Meredith* v. *Tallman*, 24 Wash. 426; *cf. Gemmer* v. *State ex rel. Stephens*, 163 Ind. 150. Yet if the constitution creates the office and requires the legislature to fix the term, an extension thereof is held improper. *People ex rel. Fowler* v. *Bull*, 46 N. Y. 57. The principal case may be supported on the ground that the respondent felt obliged to admit that the statute in question was passed solely for the purpose of extending the term of office. Such a statute is void. *State ex rel. Hamilton* v. *Krez*, 88 Wis. 135; but see *Christy* v. *Board of Supervisors*, 39 Cal. 3.

RIGHT TO SUPPORT — REMOVAL OF SUPPORT — RIGHT OF UPPER OWNER AGAINST LOWER OWNER IN BUILDING. — The plaintiff and the defendant executed an agreement under which the plaintiff erected a second story over the defendant's one-story building. The walls of the defendant's tenement, the lower story, having fallen into decay, the plaintiff, as owner of the upper story, brought this bill to compel the defendant to repair the walls of his tenement so as to afford the plaintiff's structure sufficient support. *Held*, that the defendant is under no obligation to repair the walls. *Jackson* v. *Bruns*, 106 N. W. Rep. 1 (Ia.).

The exact nature of the agreement does not appear, but it may be assumed that it took the form of a grant. This would give the plaintiff an estate; and there would be, if not an express, an implied grant of an easement of support. *Cf. Rhodes, Pegram & Co.* v. *McCormick*, 4 Ia. 368; *McConnel* v. *Kibbe*, 33 Ill. 175. The question whether this easement imposes on the lower owner any duty beyond the passive duty of non-interference with the walls arises here for practically the first time. Apparently the only decision on the point is a very old case holding the lower owner to the active duty of repair, — a case that was considered doubtful at the time, and was later expressly disapproved of. Keilw. 98 b. pl. 4; *Tenant* v. *Goldwin*, 2 Ld. Raym. 1089, 1093. Moreover, in the analogous case of easements of lateral support it seems clear that there is no active duty to repair. *Pierce* v. *Dyer*, 109 Mass. 374. It is the general rule that there is no active duty upon the servient owner. *Cf. Pomfret* v. *Ricroft*, 1 Saund. 321. But the plaintiff would probably be given the right to enter upon the lower tenement and make repairs himself, as a right necessary to the enjoyment of his easement of support. *Cf.* GALE, EASEMENTS, 7th ed., 461.

RIGHT OF SUPPORT — REMOVAL OF SUPPORT — WAIVER OF RIGHT TO SUPPORT FROM SUBJACENT ESTATE. — The plaintiff conveyed the coal under part of his farm to the defendant's predecessor in title, "together with the right to enter upon and under said land, and to mine, excavate, and remove all of said coal." The defendant removed literally all the coal, thereby causing the plaintiff's land to subside. *Held*, that the defendant is not bound to furnish support for the plaintiff's land. *Griffin* v. *Fairmont Coal Co.*, 53 S. E. Rep. 24 (W. Va.).

That the horizontal severance of land into distinct estates leaves the surface owner the right to support from below is well established. See BARRINGER & ADAMS, LAW OF MINES, 1st ed., 675–686. The court professed a full recognition of this principle, but found in the plaintiff's grant a waiver of this common law right. While such a waiver may be made, the courts strongly insist that it be clearly expressed. *Williams* v. *Hay*, 120 Pa. St. 485; see also LINDLEY ON MINES, § 821. The stipulation that the grantee should have the right to remove *all* the coal, upon which the court apparently relied in this case, has been repeatedly held not to deprive the grantor of his right to support. *Burgner* v. *Humphrey*, 41 Oh. St. 340; *Carlin* v. *Chappel*, 101 Pa. St. 348. Such stipulations seem to be typical of conveyances of this nature, and are scarcely more than express grants of the right of user, which the law itself would imply as a legal attribute to ownership in all the coal, subject, however, to the surface owner's right of support. As stated in the vigorous dissenting opinion, the decision seems to make an inroad upon well-established law, and issuing from a jurisdiction of extensive coal interests, its influence cannot be considered negligible.

SALES — RIGHTS AND REMEDIES OF BUYERS — WHETHER BILL OF SALE VOID UNDER STATUTE IS MADE ENFORCEABLE BY ESTOPPEL. — A bill of sale, not stating the consideration as required by statute, was given by the defendant to the plaintiffs. Both parties held it out as valid to third persons. It was not proved that the plaintiffs knew that the bill of sale violated the statute, and they had, apparently relying on its validity, incurred expense in consequence. *Held*, that the bill of sale is void, but that the defendant cannot, as against the plaintiffs, now be heard to say this. *Comitti* v. *Maher*, 94 L. T. R. 158 (Eng., Ch. D., Dec. 5, 1905).

If the bill of sale was, as the court indicates, absolutely void under the statute, it is difficult to see how an estoppel can make it enforceable. For a discussion of the principles involved, see 19 HARV. L. REV. 454.

TAXATION — PARTICULAR FORMS OF TAXATION — NEW YORK STOCK TRANSFER TAX. — A New York statute imposed "on all sales, or agreements to sell, or memoranda of sales or deliveries, or transfers of shares or certificates of stock in any domestic or foreign corporation . . . on each one hundred dollars of face value or fraction thereof," a tax of two cents. *Held*, that the tax is constitutional. *People ex rel. Hatch* v. *Reardon*, 35 N. Y. L. J. 419 (N. Y., Ct. App., April 17, 1906).

This case affirms the decision of the Appellate Division discussed in 19 HARV. L. REV. 460.

TAXATION — PROPERTY SUBJECT TO TAXATION — PROCEEDS OF IMPORTED GOODS, SOLD IN ORIGINAL PACKAGES. — A foreign corporation imported goods into New York, where they were sold in the original packages by its local agent. Promissory notes given in payment were held by the agent for collection at maturity, when the proceeds, less the expenses of the local business, were to be remitted to the foreign office. *Held*, that the notes are subject to state taxation. *People ex rel. Burke* v. *Wells*, 184 N. Y. 275.

While the decisions are not harmonious, a substantial body of authority holds with the present case that promissory notes owned by non-residents are taxable in the hands of resident agents. *New Orleans* v. *Stempel*, 175 U. S. 309; see 13 HARV. L. REV. 680. The case, however, presents the further question whether notes which represent the proceeds of non-taxable imports are subject to taxation. The well-established rule that gross receipts of interstate commerce are not taxable would seem to be conclusive that proceeds of imports cannot be taxed as such. *Cf. Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326. So soon, however, as such proceeds could be said to be mingled with the mass of state property, they would become taxable as such, and the question of their source would be immaterial. *Waring* v. *The Mayor*, 8 Wall. (U. S.) 110; *Hibernia*, etc., *Society* v. *San Francisco*, 26 Sup. Ct. Rep. 265. Had

the notes in question been received by the local agent for immediate remittance to the foreign office they would have been free from taxation as property *in transitu*. *Cf. Kelley* v. *Rhoads*, 188 U. S. 1. Since, however, they were to be held till maturity and to be used in part as capital in the local business, they would seem to have become incorporated with the mass of state property, and therefore subject to the tax imposed.

TRADE MARKS AND TRADE NAMES — PROTECTION APART FROM STATUTE — NAME REPRESENTING FICTION CREATED FOR BUSINESS PURPOSES. — The plaintiffs manufactured two varieties of candy known by specific names, and sold them purporting to act as "Sole Selling Agents for the Climax Confection Company." Subsequently, by a mere coincidence, the defendants, acting in the utmost good faith and caution, adopted the same name as their sole business name. *Held*, that the plaintiffs did not so adopt and use the name "Climax Confection Company" as to entitle them to protection against the defendants' use of it. *Shoemaker* v. *Ulmer*, 63 Leg. Int. 128 (Pa., C. P. No. 3, Phila. Co.).

It is now well established that business and trade names, under proper circumstances, will be protected against such use of them by another as injures the property right of good will in a business. See 10 HARV. L. REV. 280, 286–295. Yet in this class of cases, the courts have rigorously applied the equitable principle that the plaintiff must commend himself to the court in order to obtain its aid. Thus a plaintiff who is conducting an illegal business, or selling a misrepresented article, or who has adopted a deceptive name, will not be assisted. *Portsmouth Brewing Co.* v. *Portsmouth Brewing, etc., Co.*, 67 N. H. 433; see *Kohler Mfg. Co.* v. *Beeshore*, 59 Fed. Rep. 572, 574; 6 COLUMBIA L. REV. 248. Similarly, from reasons of public policy, courts have generally been reluctant to protect common generic and descriptive names, or names having an undue tendency to hinder competition. See *Canal Company* v. *Clark*, 13 Wall. (U. S.) 311, 323. In the present case there is no reason why the court could not have protected the plaintiffs' use of the name in question, although it stood for no business nor article but merely for an imaginary company. But as the granting of relief is eminently a matter for the court's discretion, it might well refuse to encourage such business fictions by furnishing protection to names applied thereto.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

PRIVITY BETWEEN CONCURRENT ADMINISTRATORS OF THE SAME DECEASED. — A writer in a recent periodical maintains that a judgment for the defendant in an action by an administrator should bind another administrator of the same deceased in another jurisdiction, because there exists between the two an "official privity." *The Relation to each other of different Administrators of the same Deceased*, by Thaddeus D. Kenneson, 6 Columbia L. Rev. 15 (January, 1906). This result Mr. Kenneson reaches in two ways. Administrator A, he says, is, in the eye of the law, the "embodiment" of the deceased. As much may be said for administrator B. A judgment against A is in effect one against the deceased, and a judgment against the deceased should conclude B. Again, both A and B represent the same group of creditors. Since a judgment against A binds the creditors it should be equally effective against their other representative.

Leaving aside for the moment the intrinsic merits of Mr. Kenneson's position, one may explain upon other grounds most of the cases which he cites to uphold it. That a sovereign has power to deal with chattels with-